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In the Matter of

LUCY E. ENOBAKHARE,
a.k.a. LULU STAR,
Respondent
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Date Issued: January 7, 1998

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Case No. 96-SCA-46
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Lucy E. Enobakhare, Pro Se

Malinda B. Schoeb
For the Department of Labor

BEFORE: Stuart A. Levin
Administrative Law Judge

DECISION AND ORDER

This proceeding arises pursuant to a complaint filed by the U.S. Department of Labor charging Respondent, a mail hauling contractor for the U.S. Postal Service, with violations of the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. § 351-358 ("the Act"), and the regulations promulgated thereunder at 29 C.F.R. Part 4. In essence, the complainant alleges, inter alia, that respondent failed to pay her hired drivers the minimum wages and fringe benefits required by wage determinations applicable to her contracts. The Department of Labor seeks back pay for the workers and three year debarment of Respondent as a government contractor. The matter was tried on June 3-4, 1997, in Burlington, Iowa.

Findings of Fact

Contract No. 52612

1. On January 28, 1994, the U.S. Postal Service awarded Lucy Enobakhare, a.k.a. Lulu Star, ("Enobakhare") contract no. 52612 ("Galesburg contract") to perform mail transport from the Post Office in Burlington, Iowa, to the Post Office in Galesburg, Illinois, and return ("Galesburg route"). The Galesburg contract was awarded in the annual amount of \$16,245.99. The contract term was from February 12, 1994, to June 30, 1997.¹ (DOL Exh. 5.)

2. In connection with Enobakhare's bid on the Galesburg contract, she submitted a cost statement which reflected a hired driver wage rate of \$9.59 per hour for each of the four hours she estimated this route required round trip. (DOL Exh. 22.) In response to Enobakhare's cost

¹In addition to the two contracts in issue, Enobakhare had two other contracts with the U.S. Postal Service for mail transportation services in Oklahoma, and Texas. (Tr. 499-500.)

statement, Robert Saxton, a Senior Contract Transportation Specialist with the U.S. Postal Service, called Enobakhare on or about January 20, 1994, and informed her that the cost statement did not contain sufficient funds to support hired driver wages. Saxton explained the wage, fringe benefits, and holiday pay requirements to Enobakhare, and Enobakhare stated that she fully understood the requirements.² Enobakhare also told Saxton that she would only hire drivers on a temporary basis, and would drive the Galesburg route herself. As a result of Enobakhare's assurances that she would drive the route, Saxton prepared a new cost statement to reflect an owner/operator performance plan, which was signed by Enobakhare on February 5, 1994. Saxton then recommended award of the contract to Enobakhare. (Tr. 61, 63-66, 68-71, 73-74; DOL Exh. 23.)

3. The Galesburg contract incorporated PS Form 7382, entitled "Additional General Provisions of Service Contract (July 1992)," which states that the Galesburg contract is subject to the Act. (DOL Exh. 5 at 5, 26-28.) Section (b)(1) of PS Form 7382 states that:

Each service employee employed in the performance of this contract by the contractor or any subcontractor shall be paid not less than the minimum monetary wages and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor or authorized representative, as specified in any wage determination attached to this contract.

(DOL Exh. 5 at 26.)

4. The Galesburg contract incorporated Wage Determination No. 77-196 (Rev. 19), dated November 5, 1993, and specifically referred to paragraph G1 of the Wage Determination, which is the classification for light vehicle drivers. (DOL Exh. 5 at 5, 11, 33-35.) Under Wage Determination No. 77-196, Enobakhare was required to pay any light vehicle drivers she employed to perform services under this contract, wages in the amount of \$9.00 per hour plus \$.89 per hour in health and welfare fringe benefits, totaling \$9.89 per hour.³ Light vehicle drivers were also entitled to ten paid holidays.⁴ (DOL Exh. 5 at 33.) Neither the wage determination nor the contract made

²During Saxton's testimony, Enobakhare agreed that Saxton explained the requirements of the wage determination to her, but that she did not understand the requirements. (Tr. 68-73). However, Enobakhare later testified that Saxton did not explain the wage requirements to her. (Tr. 473-75, 532.)

³The wage determination also required Enobakhare to give her drivers two weeks paid vacation after one year of employment. This provision, however, is not at issue in this proceeding because none of Enobakhare's drivers worked for Enobakhare for more than one year. (DOL Exh. 5 at 34; see also Tr. 22-23, 186-87.)

⁴New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, and Christmas Day. (DOL Exh. 5 at 34, 58, 65.)

the payment of health and welfare fringe benefits and holiday pay contingent upon the full-time status of an employee or an employee's length of service with the contractor.

5. Effective February 12, 1996, Wage Determination No. 77-196 (Rev. 19) was replaced by Wage Determination No. 77-196 (Rev. 22), dated March 31, 1995. The revised wage determination raised the minimum hourly wage for light vehicle drivers to \$9.54 per hour plus \$.90 per hour in health and welfare fringe benefits, totaling \$10.44 per hour. (DOL Exh. 5 at 38, 57-61, 64-68.)

6. Although Enobakhare claimed that she drove the Galesburg route herself "most of the time" between January 1995, and December 1996, the records indicate that she only drove the route between January 1995 and June 1995, September 1996, and part of October 1996. Enobakhare hired Margaret Smith, John Tabron, Linda Wagler, Shirley Lewis, James Lewis, and Attemking Pius Awumbang to drive the Galesburg route. (DOL Exh. 2; DOL Exh. 4; DOL Exh. 8.) Smith testified that on occasion, Enobakhare drove the Galesburg route when she was in Burlington. (Tr. 188.)

7. The Galesburg contract scheduled light vehicle drivers to leave the Burlington, Iowa, Post Office at 10:55 p.m., arrive at the Galesburg, Illinois, Post Office at 11:59 p.m., leave the Galesburg, Illinois, Post Office at 1:05 a.m., and arrive at the Burlington, Iowa, Post Office at 2:10 a.m. The Galesburg route was to be operated "[d]aily except Saturday [night/Sunday morning] and days before Holidays other than Martin Luther King, Jr.'s Birthday, Washington's Birthday, Columbus Day and Veteran's Day."⁵ (DOL Exh. 5 at 6; see also Tr. 168, 231-32, 254.)

8. There is no record of the actual amount of time which elapsed between the time Enobakhare's drivers daily performed their first compensable activity and the time they performed their last compensable activity on the Galesburg contract. However, records kept by the Burlington Post Office, which showed the identity of the driver, the date the driver operated the route, and the times the driver left and returned to the Burlington Post Office, indicated that it took as few as two hours and 25 minutes, to as much as four hours and 49 minutes, and an average of three hours to complete the Galesburg route. The Burlington Post Office records, however, did not include loading and unloading time, or the time required to pick up and return the van used for contract performance. (DOL Exh. 8; Tr. 119-26.) Enobakhare's drivers testified that the Galesburg route took, on average, three hours to three hours and fifteen minutes to complete. (Tr. 169, 231-32, 254, 268, 270, 278.) I find based upon the testimony of the drivers which I find credible, the Galesburg route took 3 hours

⁵The Galesburg contract did not contain a provision for additional compensation for those drivers who operated the route on Martin Luther King, Jr.'s Birthday, Washington's Birthday, Columbus Day, or Veteran's Day. However, the applicable regulations state that "[u]nless a different standard is used in the wage determination, a full-time employee who works on the day designated as a holiday must be paid, in addition to the amount he ordinarily would be entitled to for that day's work, the cash equivalent of a full day's pay up to 8 hours or be furnished another day off with pay." 29 C.F.R. § 4.174(c)(2). Because the regulations make no distinction between full-time and part-time employees, I find that this regulation is applicable to the Galesburg contract.

round trip to complete.

9. Enobakhare admitted that she did not pay her drivers fringe benefits or holiday pay, because, according to Enobakhare, the drivers, as part-time workers, were not entitled to fringe benefits or holiday pay. (DOL Exh. 2 at 2-3; Tr. 438, 536, 538, 562; see also Tr. 179-80, 217, 257, 298.) Enobakhare also did not pay her drivers for the actual amount of time that they worked. (Tr. 173, 280.) For the Galesburg route, she paid her drivers \$9.00 per hour for two hours per trip. (Tr. 173, 255, 438, 489; DOL Exh. 3 at 3, 4, 6, 9; DOL Exh. 4.) Enobakhare did not pay her drivers for an hour of waiting time at the Galesburg Post Office because, in her view, the drivers were not actually performing work during that hour.⁶ (Tr. 169, 231-33, 245-46, 255, 472, 476.) Although Enobakhare told the drivers that they could use that hour of waiting time for any purpose, the drivers generally spent that hour at the Galesburg Post Office waiting for the mail. (Tr. 169-70, 231, 255, 278.) Margaret Smith testified that Enobakhare only paid the Galesburg drivers for two hours because of financial problems. (Tr. 173.)

10. Enobakhare also admitted that she did not pay the increased wages, as required by Wage Determination No. 77-196 (Rev.22) because she did not receive a corresponding increase in the contract price. (DOL Exh. 2 at 4.) According to counsel for the Department of Labor, the contract price increase information was forwarded to Enobakhare, but Enobakhare never returned the necessary forms. (Tr. 21-22.) Although, Enobakhare stated that she did return the contract price increase forms to the U.S. Postal Service, (Tr. 27.), she did not produce copies of the documents she allegedly submitted.

11. Craig Gilchrist, Wage and Hour Compliance Officer, computed back wages and fringe benefits due the Galesburg route drivers. In doing so, he took into consideration the number of trips reflected on the Burlington Post Office records for each driver, the average of 3 hours per trip, the contractually required wage and fringe benefit rate and holiday pay, and the amount actually paid by Enobakhare. (DOL Exh. 11; DOL Exh. 13; Tr. 348-360.) Gilchrist, however, did not consider Enobakhare's time schedules for the Galesburg route, which were prepared by her drivers, and from which she paid her drivers.⁷ (DOL Exh. 1 at 4; DOL Exh. 4; Tr. 47, 489.) My findings, *infra*, regarding the number of trips made by each driver are based upon an examination of both sets of records.

Contract No. 526AG

12. On December 6, 1994, the U.S. Postal Service awarded Enobakhare contract no.

⁶Enobakhare also testified that the waiting time at the Galesburg Post Office was less than one hour. (Tr. 471, 475-76.) Wagler testified that the waiting time was less than one hour on rare occasions, but it was never less than 30 minutes. (Tr. 245-46.)

⁷Enobakhare did not submit time schedules for the Galesburg route for April 1996, May 1996, June 1996, and October 1996.

526AG (“Keokuk contract”) to perform mail transport from the Post Office in Burlington, Iowa, to the Post Office in Keokuk, Iowa, and return (“Keokuk route”). The Keokuk contract was awarded in the annual amount of \$16,999.99. The contract term was from January 7, 1995, to June 30, 1997. (DOL Exh. 6.)

13. In connection with Enobakhare’s bid on the Keokuk contract, she submitted a narrative statement and a cost statement which indicated that she intended to hire drivers at a wage rate of \$10.17 per hour for the three hours she estimated this route would require roundtrip. Her wage rate appears to be the sum of the minimum wage of \$9.28 for light vehicle drivers plus \$.89 in fringe benefits, as required by Wage Determination No. 77-196 (Rev. 20). (DOL Exh. 24; DOL Exh. 28; Tr. 78-79.) On or about December 1, 1994, Dennis Jenkins, a Contract Transportation Specialist with the U.S. Postal Service, called Enobakhare to clarify whether Enobakhare would operate the Keokuk contract herself or use hired drivers. The narrative statement indicated that she intended to use hired drivers, but Jenkins determined that her cost statement did not contain sufficient funds to support hired driver wages. Jenkins explained the requirements for hired driver wages to Enobakhare, and sent her an amended cost statement which she signed on December 3, 1994, containing the proper wages for hired drivers.

Enobakhare denied that Jenkins explained the requirements for hired driver wages to her, however, I do not find her testimony credible in this regard. She understood that a new cost statement was needed, and by education and background (See Findings 65 and 66 *infra*), I believe she would have both inquired about and understood the reason for the cost adjustments in her bid statement. After Enobakhare signed and returned the amended cost statement to Jenkins, he recommended award of the Keokuk contract to Enobakhare. (Tr. 76-81, 83-85, 88, 98-99, 102, 437; DOL Exh. 25; DOL Exh. 28.)

14. The Keokuk contract incorporated PS Form 7382, entitled “Additional General Provisions of Service Contract (July 1992)⁸,” which states that the Keokuk contract is subject to the Act. (DOL Exh. 6 at 6, 15-17.) Section (b)(1) of PS Form 7382 states that:

Each service employee employed in the performance of this contract by the contractor or any subcontractor shall be paid not less than the minimum monetary wages and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor or authorized representative, as specified in any wage determination attached to this contract.

(DOL Exh. 6 at 15.)

15. The Keokuk contract incorporated Wage Determination No. 77-196 (Rev. 20), dated

⁸Although the Keokuk contract stated that the December 1984 version of PS Form 7382 was incorporated into the contract, the July 1992 version of PS Form 7382 was actually attached to the contract.

March 14, 1994, and specifically referred to paragraph G1 of the Wage Determination, which is the classification for light vehicle drivers. (DOL Exh. 6 at 6, 12, 33-35.) Under Wage Determination No. 77-196, Enobakhare was required to pay her light vehicle drivers wages in the amount of \$9.28 per hour plus \$.89 per hour in health and welfare fringe benefits, totaling \$10.17 per hour.⁹ Light vehicle drivers were also entitled to ten paid holidays.¹⁰ (DOL Exh. 6 at 33-34.) Neither the wage determination nor the contract made the payment of health and welfare fringe benefits and holiday pay contingent upon the full-time status of an employee or an employee's length of service with the contractor.

16. Although Enobakhare claimed that she drove the Keokuk route herself "most of the time" between January 1995, and December 1996, the records indicate that she only drove the route between January 1995 and June 1995, September 1996, and part of October 1996. Enobakhare hired Margaret Smith, John Tabron, Attemking Pius Awumbang, Cora Cratton, and Virginia Stonehouse to drive the Keokuk route. Linda Wagler and James Lewis also served as relief drivers for the Keokuk route. (DOL Exh. 2; DOL Exh. 4; DOL Exh. 9.) Smith testified that on occasion, Enobakhare drove the Keokuk route when she was in Burlington. (Tr. 188.)

17. The Keokuk contract scheduled drivers to leave the Burlington, Iowa, Post Office at 2:05 p.m.; arrive at the Fort Madison, Iowa, Post Office at 2:35 p.m.; leave the Fort Madison, Iowa, Post Office at 2:40 p.m.; arrive at the Keokuk, Iowa, Post Office at 3:25 p.m.; leave the Keokuk, Iowa, Post Office at 3:30 p.m.; arrive at the Fort Madison, Iowa, Post Office at 4:15 p.m.; leave the Fort Madison, Iowa, Post Office at 4:20 p.m.; arrive at the Wever, Iowa, Post Office at 4:35 p.m.; leave the Wever, Iowa, Post Office at 4:40 p.m.; arrive at the West Burlington, Iowa, Post Office at 4:50 p.m.; leave the West Burlington, Iowa, Post Office at 4:55 p.m.; arrive at the Kirkwood Avenue Express Box at 4:58 p.m.; leave the Kirkwood Avenue Express Box at 5:00 p.m.; and arrive at the Burlington, Iowa, Post Office at 5:10 p.m. The Keokuk route was to be operated "[d]aily except Saturdays, Sundays and Holidays." (DOL Exh. 6 at 7; see also Tr. 173-74, 253, 295-96; DOL Exh. 7 at 9, 18-21.)

18. There is no record of the actual amount of time which elapsed between the time Enobakhare's drivers performed their first compensable work activity and the time they performed their last compensable activity on the Keokuk contract. However, records kept by the Burlington Post Office, which showed the identity of the driver, the date the driver operated the route, and the times the driver left and returned to the Burlington Post Office, indicated that it took as few as 2

⁹The wage determination also required Enobakhare to give her drivers two weeks paid vacation after one year of employment. This provision, however, is not at issue in this proceeding because none of Enobakhare's drivers worked for Enobakhare for more than one year. (DOL Exh. 6 at 34; see also Tr. 22-23, 186-87.)

¹⁰New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, and Christmas Day. (DOL Exh. 6 at 34.)

hours and 45 minutes, to as much as 3 hours and 45 minutes, and an average of 3 hours to complete the Keokuk route. The Burlington Post Office records did not include loading and unloading time, or the time required to pick up and return the van used for contract performance. (DOL Exh. 9; Tr. 119-26.) Enobakhare's drivers testified that the Keokuk route took, on average, three hours to three hours and fifteen minutes to complete. (Tr. 174-75, 254, 259, 270, 296; DOL Exh. 3 at 3; DOL Exh. 7 at 10.) Enobakhare admitted that the Keokuk route took three hours to complete. (DOL Exh. 3 at 3.)

19. Enobakhare admitted that she did not pay her drivers fringe benefits or holiday pay, because, according to Enobakhare, the drivers, as part-time workers, were not entitled to fringe benefits or holiday pay. (DOL Exh. 2 at 7; Tr. 438, 536, 538, 562; see also Tr. 180-81, 218.) Enobakhare also did not pay her drivers the minimum wage required by the wage determination, or for the actual amount of time worked. For the Keokuk route, she paid her drivers \$9.00 per hour for three hours per trip. (Tr. 255, 297, 438, 489; DOL Exh. 2 at 7; DOL Exh. 3 at 4, 6, 9; DOL Exh. 4; DOL Exh. 7 at 10.)

20. Craig Gilchrist, Wage and Hour Compliance Officer, computed back wages and fringe benefits due the Keokuk route drivers. In doing so, he took into consideration the number of trips reflected on the Burlington Post Office records for each driver, the average of 3 hours per trip, the contractually required wage and fringe benefit rate and holiday pay, and the amount actually paid by Enobakhare. (DOL Exh. 12; DOL Exh. 14; Tr. 353-57, 359.) Gilchrist did not, however, consider Enobakhare's time schedules for the Keokuk route, which were prepared by the drivers, and from which Enobakhare paid her drivers.¹¹ (DOL Exh. 1 at 4; DOL Exh. 4; Tr. 47, 489.) My findings, infra, regarding the number of trips made by each driver are based upon an examination of both sets of records.

The Drivers

21. John Tabron¹², at the request of Enobakhare, kept the van used for contract performance at his house, and assumed responsibility for the van, including registration and repairs. Although Enobakhare referred to Tabron as the head driver, he was not a supervisor or manager. (Tr. 194-95, 199, 214-15, 489, 561; DOL Exh. 20.) In October 1996, Attemking Pius Awumbang assumed responsibility for the van, including repairs and maintenance. (Tr. 259-69.)

22. Enobakhare's drivers were required to pick up the van at Tabron's house, which was approximately three minutes from the Burlington Post Office, and to return the van to his house when

¹¹Enobakhare did not submit time schedules for the Keokuk route for April 1996, May 1996, and June 1996.

¹²John Tabron died on November 4, 1996, and his widow Laverne testified at the hearing. (Tr. 198.)

they had finished the routes. The drivers were also occasionally required to fuel the van. (Tr. 168-69, 199, 230; DOL Exh. 2 at 8.) The drivers were not allowed to use the van for personal business. (Tr. 169, 493.) Beginning in October 1996, the van was kept at the house of Awumbang, who also lived in Burlington. (Tr. 254, 295.)

23. Tabron drove both the Galesburg route and the Keokuk route. (Tr. 198.) Enobakhare paid Tabron \$18.00 per trip for the Galesburg route, and \$25.00 per trip for the Keokuk route. (Tr. 216-17.) Tabron did not receive any fringe benefits or paid holidays. (Tr. 217.)

24. Tabron's 1995 W-2 form indicated that he received \$2,884.02 in wages from Enobakhare in 1995. That amount included \$821.90 in back wages from 1994, and a \$125.00 payment in May 1995.¹³ (Tr. 201; DOL Exh. 16.) Tabron's records indicated that Enobakhare paid him \$1200.00 in 1996. (DOL Exh. 17 at 11; 202-03.) That amount does not include a payroll check, in the amount of \$500.00, which was dishonored for insufficient funds on or about March 7, 1996, and was never paid. (Tr. 213; DOL Exh. 19.) After subtracting the back wages from Tabron's 1995 wages and adding Tabron's 1996 wages, Tabron's records indicated that he received \$3,200.00 in wages between July 1995 and August 1996. Enobakhare stated that she paid Tabron a total of \$3,325.00 between July 1995, and March 1996. That amount, however, includes the \$500.00 check which was returned and never paid, leaving a total of \$2,825. (DOL Exh. 3 at 8-9.) I find that Tabron received \$3,200.00 in wages for 1995 and 1996.

25. Enobakhare testified that due to medical treatments, Tabron needed a relief driver approximately once a week for the Keokuk route. (DOL Exh. 1 at 5; Tr. 545.) James Lewis testified that he occasionally acted as a relief driver for Tabron. (Tr. 269-71.) While the Burlington Post Office records do not identify any relief drivers for Tabron, Enobakhare's records indicated that James Lewis served as a relief driver on July 3, 1996, that Linda Wagler served as a relief driver on March 27, 1996, and that Margaret Smith served as a relief driver on July 13, 21, 27, 1995, August 3, 10, 17, 24, 31, 1995, September 14, 21, 1995, and November 2, 9, 30, 1995. (DOL Exh. 4; DOL Exh. 9.) I, therefore, have given credit for those trips to the relief drivers, instead of Tabron, as indicated by the testimony and Enobakhare's records.

26. Based upon the Burlington Post Office records and Enobakhare's records, I find that Tabron drove the Galesburg route one time in January 1996, and 30 times between June 1996, and August 1996. (DOL Exh. 4; DOL Exh. 8.) I further find that Tabron worked the week in which the Independence Day holiday fell, and therefore is entitled to holiday pay based upon the number of hours worked in the previous week.¹⁴ Because Tabron worked three hours the previous week, he is entitled to .6 hours of holiday pay.

¹³I have not included the \$125.00 payment in Tabron's total payments, because the records do not indicate that Tabron operated the two routes in May 1995.

¹⁴See 29 C.F.R. § 4.176(a)(3).

27. The Burlington Post Office Records and Enobakhare's records agree that Tabron drove the Keokuk route 206 times between July 1995, and August 1996. In addition, I have credited Tabron with twelve additional days, bringing the total to 218, where either the Burlington Post Office records or Enobakhare's records indicated that Tabron drove the Keokuk route but the other records were blank for that particular day.

28. Enobakhare's records indicated that Tabron drove the Keokuk route on September 11, 1995, September 29, 1995, and January 16, 17, and 18, 1996, (DOL Exh. 4.), while the Burlington Post Office records indicated that Smith drove the Keokuk route on those dates.¹⁵ (DOL Exh. 9.) Because Tom Sorenson, the administrative official for the Keokuk contract, testified that the Burlington Post Office supervisor was occasionally "lax" in noting the identity of the drivers on the records (Tr. 125), I credit Enobakhare's records for purposes of identifying the driver of the Keokuk route on any particular day. Furthermore, I find that records prepared by the drivers indicating when they drove a route are probably the most accurate record of who drove the truck on any particular occasion. I, therefore, find that Tabron drove the Keokuk route on September 11, 1995, September 29, 1995, and January 16, 17, and 18, 1996, bringing Tabron's Keokuk trip total to 223 trips.

29. The Burlington Post Office records indicated that Tabron drove the Keokuk route on October 12, 1995. Enobakhare's records did not indicate that Tabron drove the Keokuk route that day, but did indicate that Smith was "on call" that day. Because Enobakhare's records do not affirmatively state that Smith drove the Keokuk route on October 12, 1995, I find that Tabron drove the Keokuk route on that day. I, therefore, find that Tabron drove the Keokuk route a total of 224 times.

30. Because Tabron drove the Keokuk route the week of, and the week prior to, the following holidays, he is entitled to holiday pay for September 4, 1995 (Labor Day), October 9, 1995 (Columbus Day), November 11, 1995 (Veterans' Day), November 23, 1995 (Thanksgiving Day), February 19, 1996 (Washington's Birthday), May 27, 1996 (Memorial Day), and July 4, 1996 (Independence Day).¹⁶ Based on the number of hours worked in the week prior to the holidays, Tabron is entitled to 18.6 hours of holiday pay for the Keokuk route.

31. In May 1995, Enobakhare hired Smith to drive both the Galesburg route and the Keokuk route. (Tr. 167.) Enobakhare told Smith that she would pay her \$9.00 per hour but did not

¹⁵The Burlington Post Office records also indicated that Smith drove the Keokuk route on January 15, 1996. I do not give Smith credit for the January 15, 1996, trip because that day was a Federal holiday, Martin Luther King, Jr.'s Birthday, and the Keokuk route was not operated on Federal holidays.

¹⁶Although Tabron drove the Keokuk route the weeks of July 4, 1995 (Independence Day), and January 15, 1996 (Martin Luther King, Jr.'s Birthday), he did not work the week prior to the holidays, and therefore, is not entitled to holiday pay for those days.

mention fringe benefits or holiday pay. (Tr. 167-68, 179-80, 182, 439.) Smith received a single check covering her work for both routes. (Tr. 176.) Smith testified that Enobakhare paid her \$9.00 per hour for two hours on the Galesburg route and for three hours on the Keokuk route. (Tr. 176.)

32. Based on the Burlington Post Office records and Enobakhare's records, I find that Smith drove the Galesburg route 154 times between May 1995, and January 1996.¹⁷ Because Smith drove the Galesburg route the week of, and the week prior to, the following holidays, she is entitled to holiday pay for September 4, 1995 (Labor Day), October 9, 1995 (Columbus Day), November 11, 1995 (Veterans' Day), November 23, 1995 (Thanksgiving Day), December 25, 1995 (Christmas Day), January 1, 1996 (New Year's Day), and January 15, 1996 (Martin Luther King, Jr.'s Birthday). Based on the number of hours worked in the week prior to the holidays, Smith is entitled to 24.6 hours of holiday pay for the Galesburg route.

33. The Burlington Post Office records and Enobakhare's records agreed that Smith drove the Keokuk route 46 times between May 1995, and January 1996. Enobakhare's records further showed that Smith drove the Keokuk route eight additional times, where the Burlington Post Office records were blank in respect to the identity of the driver. (DOL Exh. 4; DOL Exh. 9.) Smith also drove the Keokuk route an additional 13 times as a relief driver for Tabron. (See finding 23.) I find that Smith drove the Keokuk route a total of 67 times.

34. Because Smith drove the Keokuk route the week of, and the week prior to, the following holidays, she is entitled to holiday pay for July 4, 1995 (Independence Day), September 4, 1995 (Labor Day), November 11, 1995 (Veterans' Day), November 23, 1995 (Thanksgiving Day), December 25, 1995 (Christmas Day), and January 1, 1996 (New Year's Day). Based on the number of hours worked in the week prior to the holidays, Smith is entitled to 10.2 hours of holiday pay for the Keokuk route.

35. Smith was paid for her work in May through October, 1995. (Tr. 176, 182, 439; DOL Exh. 32.) However, in December 1995, Smith's pay check for November 1995, was dishonored for insufficient funds. (Tr. 176-77.) Enobakhare paid the November wages by money order number 62309897673, dated November 28, 1995. (DOL Exh. 32; Tr. 177, 192.) Smith's December 1995, wages were not paid until January 26, 1996. (Tr. 177.) Claimant was not paid for her work on both routes in January 1996. (Tr. 179-80.) Smith's 1995 W-2 form, prepared by Enobakhare, indicated that she received \$3,782.70 in wages during 1995. (Tr. 180-81; DOL Exh. 3 at 4; DOL Exh. 26.) Smith did not receive a 1996 W-2 form from Enobakhare, but testified that Enobakhare paid her approximately \$837.00 in 1996. (Tr. 181-82.) I find that Smith received \$4,619.70 in wages for 1995 and 1996.

¹⁷Although the Burlington Post Office records indicated that Smith drove the Galesburg route one time in June 1995, Smith testified that she did not recall driving the Galesburg route in June 1995. (Tr. 170.) Enobakhare's records corroborated Smith's testimony. (DOL Exh. 4.) Smith's trip total for the Galesburg route does not include the June 1995, trip noted on the Burlington Post Office Records.

36. Enobakhare withheld Smith's December 1995, wages because Enobakhare was angry with Smith for driving the van used for contract performance to her home in Mediapolis, Iowa, which is about 15 miles north of Burlington. (Tr. 166, 177, 188-90, 190, 193, 492, 554, 537; DOL Exh. 1 at 4.) Smith testified that she could not afford to maintain her own car to get to and from Tabron's house where the van was kept, and Tabron agreed Smith could use the van to get to and from Mediapolis and the Burlington Post Office. Smith would not have been able to operate the routes if she was not permitted to drive the van to Mediapolis. No other driver was available to operate the routes. (Tr. 177, 193-94.) Smith testified that she spoke with Enobakhare and Tabron prior to driving the van to her home, and that Enobakhare knew that she was driving the van home but was "not happy" about the arrangement. (Tr. 178, 183, 194.) Smith also believed that she was authorized to use Enobakhare's fuel account to fuel the vehicle for the round trip between Burlington and Mediapolis. (Tr. 190, 194.) Enobakhare testified that Smith did not inform her in advance that she was going to use the van to commute to and from Mediapolis. (Tr. 439, 480.)

37. In January 1996, Enobakhare hired Linda Wagler to drive the Galesburg route. (Tr. 229-30.) Tabron told Wagler that she would receive \$9.00 per hour for two hours per round trip for the Galesburg route. (Tr. 233.) In March 1996, Enobakhare paid Linda Wagler a total of \$460.00 for driving the Galesburg route during January and February, 1996. (Tr. 236.) Wagler did not receive any wages for driving the Galesburg route in March and April, 1996. (Tr. 237, 243.)

38. Based on the Burlington Post Office records and Enobakhare's records, I find that Wagler drove the Galesburg route 80 times between January 1996, and April 1996.¹⁸ (DOL Exh. 4; DOL Exh. 8.) Wagler made 12 trips prior to February 12, 1996, the effective date of the revised wage determination, and 68 trips after February 12, 1996. Because Wagler drove the Galesburg route the week of, and the week prior to, February 19, 1996 (Washington's Birthday), she is entitled to 3.6 hours of holiday pay. I further find that Wagler drove the Keokuk route on March 27, 1996, as a relief driver for Tabron. (DOL Exh. 4.)

39. Enobakhare hired Shirley Lewis to drive the Galesburg route during the months of May and June, 1996. (Tr. 277-78, 283.) Tabron told Shirley Lewis that she would be paid \$18.00 per round trip to drive the Galesburg route. (Tr. 280.) Based on the Burlington Post Office records and Enobakhare's records, I find that Shirley Lewis drove the Galesburg route at total of 44 times during May and June 1996. Because she drove the Galesburg route the week of, and the week prior to, May 26, 1996 (Memorial Day), Shirley Lewis is entitled to 3.6 hours of holiday pay. (Tr. 278-79; DOL Exh. 4; DOL Exh. 8.) Enobakhare paid Shirley Lewis \$360.00 for driving the Galesburg route in May 1996. (Tr. 279, 291, 490, 550.) Shirley Lewis did not receive any compensation for work

¹⁸The Burlington Post Office records indicated that Wagler drove the Galesburg route on January 28, 30, and 31, 1996. (DOL Exh. 8.) Enobakhare's records indicated that Wagler drove the Galesburg route on January 30 and 31, 1996, and were blank for January 28 and 29, 1996. (DOL Exh. 4.) Wagler testified that she drove the Galesburg route on January 28, 30, and 31, 1996, but not on January 29, 1996, because she did not have her identification badge on that day. (Tr. 241.) I, therefore, find that Wagler drove the Galesburg route three times in January 1996.

performed in June 1996. (Tr. 280, 550.)

40. James Lewis, Shirley Lewis' former husband, also worked for Enobakhare as a driver.¹⁹ (Tr. 268, 271, 279, 443.) James Lewis drove the Galesburg route six times in May 1996, and three times in July 1996. (DOL Exh. 4; DOL Exh. 8; Tr. 268-70.) James Lewis also drove the Keokuk route on July 3, 1996, as a relief driver for Tabron.²⁰ (DOL Exh. 4; Tr. 269.) Enobakhare paid James Lewis approximately \$113.00 for his work in May 1996, but did not pay him for his work in July 1996. (Tr. 268, 270-71.)

41. James Lewis accompanied Shirley Lewis each night that she drove the Galesburg route, and they would take turns driving. (Tr. 269, 279, 281-83.) James Lewis did not want Shirley Lewis driving the route alone at night. (Tr. 279, 286.) James Lewis accompanied Shirley Lewis with the knowledge and approval of Tabron. (Tr. 282, 292.) Enobakhare testified that when she found out that James Lewis was accompanying Shirley Lewis, she did not pay either of them. (Tr. 549-51.) Enobakhare claimed that Shirley Lewis never drove the Galesburg route. (Tr. 283-84, 444, 544; DOL Exh. 1 at 5; DOL Exh. 3 at 6, 9.) The Compliance Officer in this proceeding is not seeking compensation for James Lewis for the days that he accompanied Shirley Lewis. The Compliance Officer is only seeking compensation for James Lewis for the nine times he drove the Galesburg route himself, (Tr. 287-89.), and for Shirley Lewis on the nights she was responsible for contract performance and drove the route or shared the driving with James Lewis. In no instance however, is Enobakhare being asked to compensate both Lewis' for the same route on the same day.

42. Attemking Pius Awumbang drove both the Galesburg route and Keokuk route for Enobakhare.²¹ (Tr. 252-254.) Enobakhare told Awumbang that he would receive \$9.00 per hour for driving the two routes. (Tr. 254.) She actually paid Awumbang nothing. He received no compensation, fringe benefits, or holiday pay for driving the two routes. (Tr. 257, 259.) Enobakhare did give Awumbang a check in the amount of \$165.95 for gasoline which Awumbang purchased, but the check was returned for insufficient funds and was never honored. (Tr. 257-58.) Enobakhare did

¹⁹Enobakhare accused James Lewis of breaking the driver's seat of the van used for contract performance. (Tr. 275, 539.) Enobakhare presented no evidence in support of her accusation. James Lewis denied breaking the seat, and testified that a bolt was missing from the seat when he picked up the van, making the van unsafe to drive. Tabron subsequently installed a new seat. (Tr. 275-76.) I find James Lewis' testimony to be credible, and in the absence of evidence to the contrary, I find that James Lewis did not break the seat of Enobakhare's van.

²⁰Although James Lewis drove the Keokuk route on July 3, 1996, he is not entitled to holiday pay for the July 4 holiday because he did not drive the Keokuk route the week prior to the holiday.

²¹Enobakhare claimed that Awumbang was her boyfriend. (DOL Exh. 1 at 3; DOL Exh. 3 at 12; Tr. 28, 439.) Awumbang denied such a relationship. (Tr. 260-61.) In any event, their personal relationship, or lack thereof, is irrelevant to the issues raised in this proceeding.

not dispute that she owes Awumbang for the gasoline. In the absence of evidence to the contrary, I find that Awumbang is entitled to reimbursement for the gasoline.

43. Based on the Burlington Post Office records and Enobakhare's records, I find that Awumbang drove the Galesburg route 42 times between October 1996, and December 1996.²² (DOL Exh. 4; DOL Exh. 8.) Because Awumbang drove the Galesburg route the week of, and the week prior to, the following holidays, I find that Awumbang is entitled to 7.2 hours of holiday pay for November 11, 1996 (Veterans' Day), and November 28, 1996 (Thanksgiving Day).

44. The Burlington Post Office records and Enobakhare's records agreed that Awumbang drove the Keokuk route 11 times in October 1996. (DOL Exh. 4; DOL Exh. 9.) The Burlington Post Office records indicated that Awumbang drove the Keokuk route on November 1, 4 and 5, 1996. Enobakhare's records indicated that Awumbang drove the Keokuk route on November 3, 4, 5, 6 and 7, 1996. I find that Awumbang did not drive the Keokuk route on November 3, 1996, because it was a Sunday, and the route did not operate on Sundays. The Burlington Post Office records attached to DOL Exhibit 7 indicated that Awumbang drove the Keokuk route on November 4 and 5, 1996, and that Cora Cratton drove the route on November 6 and 7, 1996.²³ I, therefore, find that Awumbang drove the Keokuk route on November 1, 4, and 5, 1996, and that Awumbang drove the Keokuk route a total of 14 times.

45. Enobakhare claims that she did not pay Awumbang because he told her to donate his wages to the church. (Tr. 28, 264, 443; DOL Exh. 1 at 3; DOL Exh. 3 at 12.) Awumbang testified that when Enobakhare asked him to sign an inaccurate time sheet, he refused, and told Enobakhare that in lieu of signing the inaccurate document, he would rather she donate his wages to the church. (Tr. 265.) The record contains no evidence of a donation by Enobakhare of Awumbang's wages.

46. Enobakhare testified that she told Awumbang that she was having financial difficulties, and asked him not to tell the other drivers. Enobakhare was fearful that if the other drivers knew of her financial problems, they would quit. (Tr. 440, 495-96; DOL Exh. 1 at 3.)

47. Cora Cratton, who drove the Keokuk route in November 1996, testified that Enobakhare initially told her that she would be paid \$9.00 per hour, but then lowered the wage to \$7.00 per hour. (DOL Exh. 7 at 5, 10, 21.) Cratton did not receive fringe benefits from Enobakhare. (DOL Exh. 7 at 12-13.) Cratton then heard that Enobakhare was not going to pay her drivers. Although Cratton wanted to quit, she continued to drive after Awumbang assured her that she would

²²Enobakhare's records show that Awumbang drove the route on November 31, 1996. Since November only has 30 days, the trip recorded for November 31, 1996, is not included in the total of 42 trips.

²³Although Cora Cratton testified that she drove the Keokuk route on November 5, 1996, the Burlington Post Office records and Enobakhare's records indicated that Awumbang drove the Keokuk route on that date. (DOL Exh. 4; DOL Exh. 7 at 7; DOL Exh. 9.)

be paid. (DOL Exh. 7 at 11-12.) Enobakhare paid Cratton by check in the amount of \$84.00. The check was dishonored for insufficient funds, and Cratton was charged a \$20.00 fee. Enobakhare subsequently gave Cratton a money order in the amount of \$84.00. (DOL Exh. 3 at 10; DOL Exh. 7 at 13-15.) Cratton testified that she still owed the check cashing company \$104.00 for the returned check. (DOL Exh. 7 at 13-15.) After subtracting the \$20.00 service charge, I find that Cratton received a total of \$64.00 in wages.

48. I find that Cratton drove the Keokuk route eight times during November 1996. (DOL Exh. 4; DOL Exh. 7; DOL Exh. 9.) Because Cratton drove the Keokuk route the week of, and the week prior to, November 11, 1996 (Veterans' Day), she is entitled to .6 hours of holiday pay.

49. Enobakhare hired Virginia Stonehouse to drive the Keokuk route at a wage of \$9.00 per hour. (Tr. 294, 297.) I find that Stonehouse drove the Keokuk route nine times during November and December 1996.²⁴ Because Stonehouse drove the Keokuk route the week of, and the week prior to November 28, 1996 (Thanksgiving Day), she is entitled to .6 hours of holiday pay. (Tr. 297; DOL Exh. 4; DOL Exh. 9.) Stonehouse did not receive any compensation for driving the Keokuk route. (Tr. 297-98.)

The Investigation

50. The investigation giving rise to the instant proceeding is the second investigation of Enobakhare. (DOL Exh. 1 at 5; DOL Exh. 3 at 1; Tr. 329.) The first investigation was opened in November 1994, by Gilchrist when Enobakhare's drivers complained that they were not being paid in accordance with the Galesburg contract and the Keokuk contract. Gilchrist found that Enobakhare had not paid her drivers proper wages, fringe benefits, or holiday pay. (Tr. 329-32.)

51. At a conference, held on January 19, 1995, Gilchrist discussed the requirements of the Service Contract Act and the wage determinations incorporated into both contracts. (Tr. 333.) Gilchrist specifically showed Enobakhare the wage rates for both contracts. (Tr. 333-34.) Enobakhare told Gilchrist that she would thereafter be driving both routes herself. (Tr. 334, 336.) Enobakhare consented to having money withheld from her contract for her drivers' benefit and the investigation was closed. (Tr. 334; DOL Exh. 1 at 5.)

52. Beginning in May 1995, Enobakhare hired drivers to operate the two routes. Even after Gilchrist had explained the wage determination requirements to her, Enobakhare did not pay Smith and Tabron in accordance with the wage determination requirements.

53. Gilchrist opened a second investigation in January 1996, when he received information that Smith had not been paid her December 1995, wages, and that Smith was being paid \$9.00 per

²⁴Enobakhare's records indicate that Stonehouse drove the Keokuk route on Saturday, November 30, 1996. Because the Keokuk route did not operate on Saturdays, I have not included that trip in the total number of trips for Stonehouse.

hour for two hours to operate the Galesburg route. (Tr. 335-36.) Enobakhare informed Gilchrist that she was withholding Smith's wages because Smith had driven her van between her home in Mediapolis and the Burlington Post Office. Gilchrist told Enobakhare to pay the wages and to work out the van expenses with Smith separately.²⁵ (Tr. 335, 395-96.) Gilchrist later confirmed that Smith received her December 1995, wages on January 26, 1996. (Tr. 336, 484-85.)

54. Gilchrist determined that Enobakhare was not complying with Wage Determination 77-196, or the Act. (Tr. 336.) Gilchrist wrote Enobakhare a letter, dated February 21, 1996, informing her that her "drivers have not been paid the proper wages as listed on the wage determinations" and that withholding action would be taken if she did not call him by February 26, 1996. (DOL Exh. 31.) On February 27, 1996, withholding action was commenced. (Tr. 341-42.)

55. At a March 10, 1996, meeting, Gilchrist explained the wage determination requirements in detail, including the fringe benefit and holiday pay provisions. Gilchrist and Enobakhare also discussed Enobakhare's payment for two hours of work for the three hour Galesburg route. Gilchrist testified that Enobakhare was adamant that she did not have to pay fringe benefits, and that the Galesburg route only took two hours. (Tr. 343, 347.) After the meeting, Gilchrist submitted the file to the District Office in Des Moines for withholding action. (Tr. 347.)

56. After reviewing Gilchrist's investigative findings, Don Chleborad, District Director of the Wage and Hour District Office in Des Moines, Iowa, had a telephone conversation with Enobakhare on or about March 23, 1996. Chleborad advised her that back wages were due because she had not paid her drivers for all hours worked, had not paid her drivers the prevailing wage rate, had not paid her drivers fringe benefits, and had not paid her drivers for holidays as required by the contracts. Chleborad again explained the wage provisions of the two contracts. (Tr. 313, 316-17.) Chleborad testified that Enobakhare did not agree with the investigative findings. Enobakhare argued that her drivers were not entitled to fringe benefits because they only worked part time, and were not entitled to the money "for various reasons." (Tr. 317, 438.)

57. Withholding was initiated to cover the initial back wage computation of \$4,000.00 made by Gilchrist. (Tr. 317-18.) The U.S. Postal Service, however, released \$1,625 to Enobakhare, at the direction of Chleborad, after Enobakhare called Chleborad, and told him that she was not able to pay her drivers because of the withholding. (Tr. 318, 324, 449-451.) After Enobakhare sent Chleborad a note, dated March 1, 1996, promising to use the money to pay \$700.00 to John Tabron, \$495.00 to Margaret Smith, and \$430.00 to Linda Wagler, \$1,625.00 was released to her.²⁶ (Tr. 318,

²⁵In calculating the back wages owed by Enobakhare, Gilchrist originally gave Enobakhare a credit for Smith's personal use of the van. (Tr. 342, 398, 401-04.) Later back wage calculations did not include a credit for the use of the van. (Tr. 401.)

²⁶DOL Exhibit 10 is dated March 1, 1996, and the time is noted as 11:15 a.m. A second note, dated March 1, 1996, 11:45 p.m., states that Enobakhare agrees to pay Tabron \$793.00, Wagler \$480.00, and Smith \$495.00 upon the release of funds. (DOL Exh. 33.)

478; DOL Exh. 10.)

58. With the exception of \$460.00 paid to Wagler, Enobakhare did not use the money released by the U.S. Postal Service to pay wages. (Tr. 319, 477, 552-54.) She testified that after the money was released and she had paid Wagler, she saw information compiled by the U.S. Postal Service which made her “mad,” and because she was mad at the U.S. Postal Service, she decided not to pay her other drivers. (Tr. 477-79.) Enobakhare allegedly used the released funds to pay her fuel bills. (Tr. 483-84, 560.) When asked why if she was angry at the U.S. Postal Service, she penalized her drivers by not paying them, Enobakhare testified that she was also angry at Smith for using the van for personal reasons. (Tr. 479.) Enobakhare claimed that she did not know at the time she assured Chleborad on March 1, 1996, that she would pay her drivers, that Smith had used her van in December 1995, to commute to and from Mediapolis. (Tr. 480, 482.) Yet Enobakhare also testified that she withheld Smith’s December 1995, wages because of Smith’s personal use of the van, and that she paid the December 1995, wages in January 1996, after Gilchrist instructed Enobakhare to pay the wages notwithstanding her dispute with Smith over the use of the van. (Tr. 485, 555, 558-59.) The issue of Smith’s personal use of the van was not only known to Enobakhare but resolved when, on March 1, 1996, she committed to pay her drivers upon the release of withheld funds by the U.S. Postal Service. Her testimony explaining why she failed to honor her commitment to pay her drivers with the funds released to her is inconsistent and is not credible.

59. On May 13, 1996, the Department of Labor requested that the U.S. Postal Service withhold \$809.00 per month for four months, and \$509.00 per month thereafter. The \$809.00 was to recoup the \$1,625.00, less the \$460.00 paid to Linda Wagler, previously released to Enobakhare which was not used to pay her employees. The monthly withholding amount was computed by Chleborad, after determining that the amount withheld, when subtracted from Enobakhare’s monthly payment for both contracts of approximately \$2,700.00 to \$2,800.00, would leave enough money to pay the drivers.²⁷ On May 13, 1996, Chleborad, unable to reach Enobakhare by telephone, wrote to inform her of the monthly withholding. (Tr. 319-322; DOL Exh. 30.)

60. In a letter dated August 27, 1996, to counsel for the Department of Labor, Enobakhare represented that she was running the route herself. (DOL Exh. 34.) Thereafter, Enobakhare hired Awumbang, Cratton and Stonehouse to drive the two routes for her between October 1996, and December 1996, and still did not pay them in accordance with the terms of the wage determinations. Under cross examination, Enobakhare denied that she had hired drivers, and testified that the drivers operated the two routes on a temporary basis only. (Tr. 493-95.)

61. At the hearing, Enobakhare testified that a Postal Official, Tom Sorenson, “lied” about her, gave inaccurate information to the Department of Labor wage and hour investigators, (Tr. 141-46, 437, 440, 471), and falsified postal records (Tr. 455), for the purpose of getting rid of her as a

²⁷Enobakhare testified that the fuel company electronically deducted her fuel payment from her bank account, and that after the withholding and fuel deduction, she only had \$200.00 per month to pay her drivers. (Tr. 497, 552, 561.)

contractor. (Tr. 33, 35.) She testified that “Some Department of Labor (and) postal employees are contractors and they all work together. They want to get rid of me,” (Tr. 36). She further accused Postal officials of “brainwashing” her drivers (Tr. 438, 476). Enobakhare hired a private investigator to investigate her suspicions. (Tr. 443-44.)

62. The record contains no evidence that any postal official was a mail contractor, or in any way sought to compete with Enobakhare, lied about her, or acted against her in any way for personal gain. Her suggestions and accusations to the contrary are, on this record, devoid of merit.

63. Any inaccuracies in the voluminous logs maintained by the U.S. Postal Service concerning mail pickup and delivery times or drivers, on this record, are minor in nature and unintentional. For example, Enobakhare vigorously challenged a five minute daily discrepancy in the three hour Keokuk route. The U.S. Postal Service recorded it as a 3 hours 5 minute route while Enobakhare argued that it was three hours. (Tr. 467-470.) The Department of Labor, however, had already discounted the five minute daily difference in the route, charging only 3 hours to complete it.

64. Enobakhare accused her drivers of lying in their testimony at the hearing. (Tr. 476.) Although her drivers were fairly conscientious in their performance of the contracts while Enobakhare attended to her other business in Texas and Oklahoma, and although Enobakhare did not pay full wages, fringe benefits or holiday pay to her drivers, she testified that when she was not at Burlington, “most drivers they took advantage of me.” (Tr. 32.). The record fails to support Enobakhare’s assertion that her employees lied about their employment or took advantage of her. To the contrary, the record shows that Enobakhare frequently took advantage of her drivers by failing and refusing to pay them earned wages or reimburse them for business expenses incurred on her behalf.

65. Enobakhare testified that she was born in Nigeria, and it is apparent that English is not her first language. Enobakhare, however, is well educated, and, in fact, testified that she attended high school in London, England, junior college in Paris, France, and earned a degree in economics from an unspecified university in the United States. (Tr. 506.)

66. Enobakhare has considerable skills attained not only through education but experience in comprehending and dealing, in the English language, with financial questions probably more complex than any posed by the wage determinations in this matter. For example, she testified that she was employed four years by the U.S. Internal Revenue Service to respond to taxpayer inquiries by telephone. Through her IRS employment she testified she learned the significance of classifying her drivers as “non-employees,” to shift responsibility for payment of social security taxes (F.I.C.A.) to the drivers. (Tr. 503-507.)

Discussion and Conclusions of Law

I.

Back Wage Determination and Holiday Pay

Enobakhare admitted that she did not pay her drivers health and welfare benefits in accordance with Wage Determination 77-196, and the evidence further shows that she did not provide her employees with paid holidays in accordance with the Wage Determination. Furthermore, Claimant admitted that she paid her drivers \$9.00 per hour, which is less than the minimum wage prescribed in Wage Determination 77-196 (Rev. 22), applicable to the Galesburg contract after February 12, 1996, and Wage Determination 77-196 (Rev. 20), applicable to the Keokuk contract. I, therefore, conclude that Enobakhare violated the Act by failing to pay her drivers in accordance with the wage determinations incorporated into the contracts.

Enobakhare contends that she did not pay the increased wage amounts for the Galesburg contract as prescribed in Wage Determination 77-196 (Rev. 22), because the Postal Service did not increase her total contract price to cover the wage increase. This argument is not persuasive. Enobakhare had a duty to pay the increased wages from the effective date of the revised wage determination. She is not relieved from that duty while waiting for the contract price increase to be processed. See In the Matter of International Resources Corp., 94-SCA-35 (ALJ Jan. 3, 1996), citing In re Kleen-Rite, Corp., BSCA 92-09 (Oct. 13, 1992). Moreover, on this record, I am not persuaded that Enobakhare is credible when she claims she would have paid the increased wages if a contract price increase had been processed. Enobakhare was repeatedly advised of the requirements of the Act and the wage determinations and not only ignored the requirements, but steadfastly refused to comply, even after the first investigation. She did not pay the higher minimum wage required by the Keokuk contract, she did not pay Awumbang and Stonehouse for their work on either contract in October, November, and December 1996, and Cratton testified that Enobakhare told her in November 1996, that her wage would be reduced to \$7.00 per hour. This record provides no support for Enobakhare's suggestion that a contract price increase would have resulted in her compliance with the Act or the wage determinations. She failed to comply with the compensation requirements of her contracts at any time relevant to this proceeding.

Although Enobakhare now apparently agrees that she is required to pay her drivers health and welfare fringe benefits and holiday pay, she repeatedly argued that her drivers were not entitled to such benefits because they were part-time employees, and had not worked for her for more than one year. Yet the contract provisions, the wage determinations, and the applicable regulations do not make the payment of such benefits contingent upon the full-time status of the employee, or the employee's length of service with the contractor, and responsible officials at both the Postal Service and the Department of Labor advised her accordingly.

The regulations state, in pertinent part, that "[t]he Act makes no distinction, with respect to its compensation provisions, between temporary, part-time, and full-time employees, and the wage and fringe benefit determinations apply, in the absence of an express limitation, equally to all such service employees engaged in work subject to the Act's provisions." 29 C.F.R. § 4.164 (a)(2); see also 29 C.F.R. §4.176(a). The regulations further state that "holiday benefits cannot be denied because the employee has not been employed by the contractor for a designated period prior to the

named holiday or because the employee did not work the day before or the day after the holiday, unless such qualifications are specifically included in the determination.” 29 C.F.R. § 4.174. The terms of the two contracts did not limit the applicability of these regulations. Enobakhare was required to pay her drivers fringe benefits and holiday pay, and Department of Labor officials made every effort, during the first investigation, to both advise her of these requirements and secure her compliance. Her continued failure to comply is a violation of the Act, and is, on this record, inexcusable.

Enobakhare paid her drivers for two hours to complete the Galesburg route and argued that an hour of waiting time at the Galesburg Post Office is not compensable work time. She bid the route at an estimated 4 hours to complete.

The computation of hours worked, for purposes of the Act, is made in accordance with the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, and 29 C.F.R. § 785. 29 C.F.R. § 4.178. The regulations provide the following examples of compensable and non-compensable waiting time:

(a) *General.* Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.

(b) *Truck drivers; specific examples.* A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer’s property, he is also working while waiting. In both cases the employee is engaged to wait. Waiting is an integral part of the job. On the other hand, for example, if the truck driver is sent from Washington, DC to New York City, leaving at 6 a.m. and arriving at 12 noon, and is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip the idle time is not working time. He is waiting to be engaged. 20 C.F.R. § 785.16 (citations omitted.)

In the present case, the drivers were required to wait between one-half hour and one hour at the Galesburg Post Office. Like the above examples where waiting time was compensable, Enobakhare’s drivers were waiting for the Galesburg Post Office to process the mail so that the drivers could transport the mail to the Burlington Post Office. The waiting time was unpredictable, of short duration, and was an integral part of the drivers’ duties. Although Enobakhare told her drivers that they could use the waiting time for any purpose, the drivers could not, as a practical matter, effectively use the time, because the wait was of short duration, late at night, and Enobakhare did not allow the drivers to use the van for personal business. I conclude, in accordance with the applicable regulations, that the waiting time at the Galesburg Post Office was compensable, and that Enobakhare was required to pay her drivers for three hours round trip for each Galesburg run.

II.

Alleged Misuse of Employer's Van

Enobakhare contends that she is entitled to a credit for Margaret Smith's personal use of her van. The regulations state in pertinent part:

(a) The wage requirements of the Act will not be met where unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required under the provisions of the Act and the regulations. . . Authorized deductions are limited to those required by law, such as taxes payable by employees required to be withheld by the employer and the amounts due employees which the employer is required by court order to pay to another; deductions allowable for the reasonable cost or fair value of board, lodging, and facilities furnished as set forth in § 4.167

Deductions for personal use of the van are not required by law and are not authorized deductions payable to a third person for the employee's benefit. The proposed deductions are also not for the reasonable costs of board or lodging. Transportation to and from work may be considered facilities for purposes of authorized deductions, 29 C.F.R. §531.32(a), if the employer customarily provides such facilities to her employees, and the facilities are for the benefit of the employee. 29 C.F.R. 531.31.

In this instance, although Smith thought she was authorized by Tabron to use the van, Enobakhare did not agree drivers could use the van for personal business. Enobakhare, therefore, did not customarily provide her van for her employees personal use.

The record here shows that Smith could not have performed the contract unless she were able to use the van to drive to and from her home, and with Tabron's permission, which Smith had reason to believe was sufficient, she did so, primarily for the benefit of Enobakhare. Enobakhare, therefore, could not properly reduce Smith's wages for use of the van. See Brennan v. Sam Dell's Dodge, 451 F.Supp. 294 (N.D.N.Y. 1978). Although Gilchrist did initially calculate a credit to Enobakhare for Smith's use of the van, such a credit is inappropriate under these circumstances.

III.

Unauthorized Conduct

Enobakhare next contends that she does not owe Shirley Lewis or James Lewis any wages because James Lewis accompanied Shirley Lewis on the Galesburg route, and because James Lewis assisted Shirley Lewis with the driving. Enobakhare claims that Shirley Lewis never drove the Galesburg route, and that James Lewis was not authorized to accompany Shirley Lewis.

Under the Act, a contractor is required to pay all service employees who perform contract work the minimum wage set forth in the contract's wage determination. 41 U.S.C. § 351. The Act defines service employee as "any person engaged in the performance of a contract entered into by the United States and not exempted under section 356 of this title, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States" 41 U.S.C. § 357. The United States Supreme Court has defined work as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 64 S.Ct. 698, 703 (1944).

Shirley Lewis credibly testified that she performed work under the Galesburg contract, and that James Lewis assisted her with the driving. Enobakhare did not produce any evidence which substantiated her allegations that Shirley Lewis never drove the Galesburg route, and in the absence of such evidence, I do not credit her allegations. Although Shirley Lewis did not actually perform all of the driving, she remained responsible for the operation of the route the entire three hours of every trip, and thereby performing work under the Galesburg contract for which she must be compensated. Moreover, Enobakhare received the benefit of the contract performance by Shirley Lewis even though James Lewis voluntarily accompanied Shirley and may have voluntarily helped her. The service employee under the Galesburg contract on these occasions was Shirley Lewis, and she is entitled to three hours of wages per trip for operating the Galesburg route.

Enobakhare next argues that the acts of Smith and the Lewises were unauthorized, and therefore, she should not have to pay their wages. Although the record shows that Smith had reason to believe that she was authorized to use the van, and although the record fails to show that Shirley Lewis was ever advised by Tabron or Enobakhare that she was required to drive the route alone, assuming both Smith and the Lewis' acted without authority, Enobakhare's remedies do not include the withholding of wages. Neither the contract, the Act, nor the applicable regulations permit a contractor to withhold wages in response to an unauthorized act of an employee. Brennan v. Veterans Cleaning Service, Inc., 482 F.2d 1362 (5th Cir. 1973) (employer's deduction from wages for property damage was violation of Fair Labor Standards Act). A contractor may only reduce an employee's wages below the minimum wage rate under certain circumstances set forth in 29 C.F.R. § 4.168, and the facts of this case do not fall within those circumstances. Furthermore, to the extent Enobakhare had problems with her drivers, they were largely due to her own failure to adequately supervise them.

IV.

Compensation Due and Owing

Enobakhare owes her drivers back wages, including fringe benefits and holiday pay, in the total amount of \$12,093.11, as follows:

John Tabron

	Total Trips	Total Hours	Wage Rate	Subtotal
Galesburg	1	3	9.89	29.67
	30	90	10.44	93.60
Holiday		.6	10.44	6.26
Keokuk	224	672	10.17	6,834.24
Holiday		18.6	10.17	189.16
Payments				3,200.00
TOTAL				3952.93

Margaret Smith

	Total Trips	Total Hours	Wage Rate	Subtotal
Galesburg	154	462	9.89	4,569.18
Holiday		24.6	9.89	243.29
Keokuk	67	201	10.17	2,044.17
Holiday		10.2	10.17	103.73
Payments				4,619.70
TOTAL				2,340.67

Linda Wagler

	Total Trips	Total Hours	Wage Rate	Subtotal
Galesburg	12	36	9.89	356.04
	68	204	10.44	2129.76
Holiday		3.6	10.44	37.58
Keokuk	1	3	10.17	30.51
Payments				460.00
TOTAL				2093.89

Attemking Pius Awumbang

	Total Trips	Total Hours	Wage Rate	Subtotal
Galesburg	42	126	10.44	1315.44
Holiday		7.2	10.44	75.17
Keokuk	14	42	10.17	427.14
Gas				165.95
Payments				0.00
TOTAL				1983.70

James Lewis

	Total Trips	Total Hours	Wage Rate	Subtotal
Galesburg	9	27	10.44	281.88
Keokuk	1	3	10.17	30.51
Payments				113.00
TOTAL				199.39

Shirley Lewis

	Total Trips	Total Hours	Wage Rate	Subtotal
Galesburg	44	132	10.44	1378.08
Holiday		3.6	10.44	37.58
Payments				360.00
TOTAL				1055.66

Cora Cratton

	Total Trips	Total Hours	Wage Rate	Subtotal
Keokuk	8	24	10.17	244.08
Holiday		.6	10.17	6.10
Payments				64.00
TOTAL				186.18

Virginia Stonehouse

	Total Trips	Total Hours	Wage Rate	Subtotal
Keokuk	9	27	10.17	247.59
Holiday		.6	10.17	6.10
Payments				0.00
TOTAL				280.69

Debarment

The Service Contract Act provides that, “unless the Secretary recommends otherwise because of unusual circumstances,” a service contractor who violates the Act shall be debarred for three years. 41 U.S.C. § 354(a). The regulations at 29 C.F.R. § 4.188(b)(3) set forth the criteria for determining whether unusual circumstances exist. A contractor is not be relieved from the debarment sanction if the violations were willful, deliberate, aggravated in nature, or the result of “culpable” conduct such as culpable neglect to ascertain whether practices are or were in violation. Relief from debarment is also inappropriate where a contractor has a history of similar violations, serious violations, or repeated violations of the provisions of the Act. 29 C.F.R. § 4.188(b)(3)(i). Relief from the debarment sanction requires “a good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance.” 29 C.F.R. § 4.188(b)(3)(ii).

In the present case, I find not only the absence of unusual circumstances, but deliberate violations by a contractor whose assurances of future compliance are not credible. Enobakhare argues that she should not be debarred, because she did not understand the provisions of the wage determination. Yet officials of the U.S. Postal Service explained the requirements of the wage determinations to Enobakhare prior to the award of both contracts. Officials of the Department of Labor explained the requirements of the wage determinations to Enobakhare during the two investigations in the Fall of 1994, and the Winter of 1996.

Enobakhare is an educated person with a college degree in economics, and her assertion that she “misunderstood” the wage determinations lacks credibility, especially after the requirements were explained to her on several occasions. I believe she understood these explanations, but refused to comply because she “disagreed” with them. Having observed her testimony and demeanor over the course of a two day hearing, I further believe Enobakhare understood the requirements of the wage determinations, bid the contracts, and revised her cost statement, accordingly. Yet, she deliberately withheld from her drivers the required compensation, even after the first investigation resulted in a withholding action against her to pay the back wages then due.

Enobakhare’s credibility in this proceeding was further diminished by her account of her refusal to pay driver’s wages with money specifically released to her for that purpose. The U.S. Postal Service released money to her in March, 1996, following her assurance that she would use the funds to pay her drivers. On March 1, 1996, Enobakhare wrote to Chleborad “I . . . agreed to pay wages for February 1996 to the following labourer drivers . . . immediately upon the receive [sic] of the above stated (\$1,625.00) amount from the United States Postal Service.” (DOL Exh. 10.) Enobakhare did not, however, use the funds released to her pay wages to all entitled employees.

Enobakhare’s testimony about why she failed to use the released money to pay her drivers was inconsistent and not worthy of credence. First, Enobakhare testified that she did not pay her workers because she was “angry” at the U.S. Postal Service. When asked why she would penalize her

workers if she was angry at postal officials, she proffered a different reason. She then testified that she was also “mad” at Smith for using her van. Yet, Smith was not the only driver whose wages were not paid, and Gilchrist had specifically advised Enobakhare in January 1996, that she could not withhold Smith’s wages for using the van.

There is another aspect of this testimony which is here relevant. While I find it dubious that Enobakhare would penalize her drivers, because she was “angry” at postal officials, her alternative reason for not using released funds to pay the drivers is even more troubling. The record clearly shows that Enobakhare knew Smith had used her van before she wrote the March 1, 1996, note to Chleborad assuring him that if the funds were released she would pay the drivers. Therefore, if as she testified, Enobakhare was still angry because Smith had used her van, and her anger impelled her not to pay Smith or other drivers with released funds, then her representations and promises to pay the driver’s, as memorialized in her note to Chleborad, seem rather disingenuous.

The record shows that officials at both the Postal Service and the Department of Labor really made every effort, in good faith, over a considerable period of time, both to advise and assist this contractor and bring her into compliance. None of their efforts were fruitful. For all of the foregoing reasons, I am, on this record, unable to conclude that Enobakhare’s actions are the actions of a contractor who is willing to comply with the Act and the applicable wage determinations. I find not only an absence of any unusual circumstance which might warrant relief from the sanction of debarment in this case, but the existence of violations which were willful, repeated, and serious.

ORDER

IT IS ORDERED that the U.S. Postal Service release to the Department of Labor \$12,093.11 of the funds withheld from Lucy E. Enobakhare, aka Lulu Star, for payment of back wages and fringe benefits to employees in accordance with the decision herein;

IT IS FURTHER ORDERED that pursuant to Section 5(a) of the Act, 41 U.S.C. § 354(a), Lucy E. Enobakhare and any firm, corporation, partnership, or association in which Enobakhare has a substantial interest be denied the award of any contract with the United States Government until three years have elapsed from the date of publication by the Comptroller General of an ineligibility list containing the name of Lucy E. Enobakhare;

IT IS FURTHER ORDERED that no action be taken to relieve Lucy E. Enobakhare from the debarment list.

Stuart A. Levin
Administrative Judge

